United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

141

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24, 440

UNITED STATES OF AMERICA, APPELLEE

V.

TIMOTHY BROWN, APPELLANT

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

LEONARD I. ROSENBERG
Attorney for Appellant
1525 New Hampshire Ave.
Washington, D.C. 20036

(Appointed by this Court)

TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND AUTHORITIES

CASES

STATUTES AND AUTHORITIES

* STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WAS THE APPELLANT ENTITLED TO A JUDGMENT OF ACQUITTAL AS A MATTER OF LAW IN VIEW OF THE ABSENCE OF ANY EVIDENCE UPON WHICH THE TRIAL COURT COULD FIND THAT THE APPELLANT KNEW THAT THE PISTOLS WERE PRESENT IN HIS VEHICLE?

II. WAS THE EVIDENCE INTRODUCED AT THE TRIAL BELOW SUFFICIENT TO ESTABLISH THAT THE WEAPONS FOUND IN APPELLANT'S VEHICLE WERE WITHIN HIS ACCESS OR REACH?

III. DOES THE APPELLANT'S CONVICTION REST UPON AN IMPERMISSIBLE INFERENCE UPON ANOTHER INFERENCE?

* THIS CASE HAS NOT BEEN BEFORE THIS COURT UNDER THE SAME OR SIMILAR TITLE.

REFERENCE TO RULINGS

NONE

STATEMENT OF THE CASE

Appellant, Timothy Brown and a Co-defendant, David L. Werts, were charged in a one-count indictment in Criminal No. 83-70 with a violation of 22 D.C. Code, Section 3204, "Carrying a pistol without a license."

On March 25, 1970, a hearing on a Motion To Supress Evidence, filed jointly by Appellant and Co-defendant Werts, was held before the Trial Court to determine whether arresting officer acted with "probable cause" when he arrested Appellant and the Co-defendant, and whether, conceding the illegality of the initial arrest, the subsequent search of the vehicle was beyond the authorized scope of a search pursuant to a warrantless arrest. The Trial Court, in a written opinion dated March 30, 1970, denied Appellant's Motion To Supress Evidence. The opinion of the Trial Court is part of the record on appeal.

During the course of the Hearing on Appellant's Motion To Supress Evidence (Hearing Transcript, pp. 6-9), it was revealed the counsel for Co-defendant Werts had obtained a signed statement from Appellant, which allegedly exonerated the Co-defendant Werts and incriminated Appellant with respect to the offense charged in the Indictment. The Trial Court stated it would schedule a separate hearing on the question of whether

a severence should be granted in view of the statement and whether the statement would be admitted into evidence. (Hearing, pp. 55-59). On April 2, 1970, a Hearing was held by the Trial Court on the circumstances under which the statement by Appellant was obtained by counsel for Co-defendant Werts and pursuant to that Hearing, the Trial Court determined that the statement had been lawfully obtained by Werts' counsel and it reserved ruling for a later date on the admissibility of the statement at a joint trial of Appellant and Co-defendant Werts. (Severence Hearing, pp. 23-29).

On April 27, 1970, the Appellant waived his right to trial by jury in open court and a trial by Court was held on that date. Metropolitan Police Officer Patrick J. Lilly, the government's only witness at the trial, testified that he observed Appellant driving a vehicle at 3:15 A.M. on December 23, 1959, and that he stopped Appellant's vehicle in the 1200 block of U Street, N.W. (Trial, p. 7). Officer Lilly approached the passenger's side of Appellant's vehicle where he observed Co-defendant Werts "in a bent-over position, with his hands between his legs". (Trial, p. 8). Officer Lilly then testified,

> "I opened the door at this time, and asked Mr. Werts to step from the vehicle. Mr. Werts at this time gave me a blank stare,

> and I assisted Mr. Werts out of the vehicle. As I placed my left hand on his right arm and removed him from the vehicle, I heard something hit the floor of the automobile. As I took Mr. Werts from the auto, I looked down into the floor of the car to see what it was, and I saw at this time a .380 caliber automatic." (Trial, p.8)

After placing Mr. Werts under arrest, Officer Lilly returned to the vehicle to seize the pistol. Appellant had already been removed from the vehicle by another Officer. (Trial, pp. 8-9) Upon returning to the vehicle, Officer Lilly saw "gun grips of another weapon on the floor, which turned out later to be a .22 Derringer." (Trial, ibid). The .22 Derringer was located "partially under the...passenger seat...approximately 6 inches from the center..." (Trial, ibid).

Officer Lilly testified that he observed both weapons test fired and the government then moved both pistols into evidence, which the Court admitted over the Appellant's objection that they were obtained as a result of an illegal arrest. (Trial p.11) The government then introduced without objection a certificate that the Appellant was not licensed to carry a pistol in the District of Columbia as required by law.

Upon cross-examination, Officer Lilly admitted that he at no time observed the Defendant make any furtive movements or

"any movements whatsoever over to Mr. Werts' side of the car." (Trial, p. 12). Officer Lilly further testified that he did not observe the Appellant drop either of the pistols seized by him. (Trial, p. 12). Officer Lilly further stated that the Derringer was partially hidden under the front passenger seat, and that only the white grips were exposed. (Trial, p. 13). Officer Lilly did not run a fingerprint test on either of the weapons he seized, nor did Appellant have any weapon or ammunition on his person when he was searched after his arrest. (Trial, p. 14).

Upon conclusion of Officer Lilly's testimony, the government rested its case and Appellant moved for a directed judgment of acquittal, which Motion was denied by the Court. (Trial, p. 17). The Appellant, after consulting with his trial counsel, decided not to take the witness stand in his own defense or put on any evidence. (Trial, pp. 17-18). The Trial was concluded at this point and the Court returned a verdict of Guilty. (Trial, p. 19).

Trial of the Co-defendant, Mr. Werts, whose case had been severed from the Appellant's in view of the Co-defendant's decision to be tried by a jury, began at the conclusion of Appellant's trial. The jury, listening to the identical evidence introduced during the trial against the Appellant, acquitted the Co-defendant Werts.

ARGUMENT

I - APPELLANT WAS ENTITLED TO A JUDGMENT OF ACQUITTAL AS A MATTER OF LAW IN VIEW OF THE ABSENCE OF ANY EVIDENCE UPON WHICH THE TRIAL COURT COULD FIND THE APPELLANT KNEW THAT THE PISTOLS WERE PRESENT IN HIS VEHICLE.

22 D.C. Code §3204 makes it an offense for any person within the District of Columbia to "Carry either openly or concealed on or about his person...a pistol without a license therefore issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed." The activities made criminal by this statute contemplate a general as opposed to a specific criminal intent. (Wilson v. United States, 91 U.S.App. D.C. 135, 198 F.2d 299, 1952). A person who intentionally commits the act made criminal by this statute violates the law despite the absence of any specific intent to commit any other offense. It goes without saying, that there must be evidence sufficient to convince the finder of fact beyond a reasonable doubt that the person accused of violating this statute knew that he was carrying a pistol or other dangerous weapon within the meaning of the statute in order that he have the requisite general intent to commit the prohibited acts.

Certainly, the government could not contend that a person violates this statute if he lacks the requisite knowledge that the weapon is "on or about his person". A person lacking such knowledge would not have the requisite general intent to do the acts prohibited by the statute. The burden of proving that the Appellant knew that the pistols were present in his vehicle and hence had the requisite general intent to commit the offense charged in the Indictment was on the government. The circumstantial evidence on which the government relies to establish this element of the offense must exclude every reasonable hypothisis except that of guilt. (See Hill v. District of Columbia, 264, A.2d 114, 1970.)

The decided cases in the District of Columbia have not discussed at any length this requirement that a person know of the presence of a pistol or other dangerous weapon on or about his person within the meaning of the statute. In the Hill case, the District of Columbia Court of Appeals construed the term "possess" as it appears in the District of Columbia Police Regulations, Article 53, Section 2, as follows:

> "'Possess' as used in the Police Regulations may be either actual possession or constructive possession, i.e., knowledge of the presence of the pistol or ammunition and the exercise of dominion and control over them." (264 A.2d at 146. Emphasis in original.)

The decided cases in other states having statutes similar or identical to 22 D.C. Code §3204 have held that knowledge of the weapons presence is essential to establish the crime. (People v. McKnight, 39 Ill.2d 577, 237 N.E.2d 488, 1958; "Offense of carrying a concealed weapon as affected by manner of carrying or place of concealment" 43A.L.R.2d 492.

In the McKnight case, the Court affirmed a driver's conviction for carrying a pistol, but stated that "...knowledge that the gun was in the car was essential to establish a crime. (237 N.E.2d at 490). The Court in the McKnight case, held that circumstantial evidence was sufficient to establish the driver's knowledge of the presence of the pistol in the vehicle, but only in view of the testimony at the trial in that case of suspicious movements observed by the arresting officer on the part of the driver in and about the vicinity of which the pistol was found in the car.

At Appellant's trial below, there was absolutely no evidence concerning Appellant's movements or conduct, observed by the arresting officers which would support the inference that Appellant knew of the presence of the pistols in the vehicle. As in the case of Arrellanes v. United States, 302 F2d 603 (9th C.C.A., 1962), the evidence at Appellant's trial "cannot show the possession or control which the government must establish to raise the presumption of guilty knowledge" (302 F.2d at 606-607. Emphasis in original.)

Absent such testimony, either through direct or circumstantial evidence, the trial court must of necessity have inferred Appellant's guilty knowledge of the presence of the pistols in the vehicle from his presence in the vehicle.

It has been long settled that the mere presence of a person at the scene where a criminal offense is committed, without more, creates neither an inference, presumption, nor any evidence against him. (United States v. DiRe, 332 U.S. 581, 1948). The danger inherent in affirming Appellant's conviction in this case is the possibility of setting a precedent whereby a person or persons who occupy a vehicle may be held criminally responsible for possessing prohibited items such as a pistol which may be found in the vehicle. It is not at all uncommon for groups of people, two, three or more, to be riding around the city of Washington in car pools to and from work, or for social or recreational purposes. If a pistol or other dangerous weapon or contraband is found under such circumstances, could it be said, without other evidence, that the mere presence of such persons in a vehicle where the pistol or other dangerous weapon or contraband is found, are each guilty of the substantive crime because they are present in the vehicle? Could it be said that any particular person is guilty of the offense because of his or her presence in the vehicle? To permit a court to infer knowledge of

the presence of a weapon or similar contraband in a vehicle to a person who happens to be present in that vehicle, without further evidence, would give the police a free hand in arresting any and all occupants in a vehicle and give the government carte blanche in prosecuting any and all occupants of the vehicle for possession of such a weapon or contraband. This notion is alien to established principles of "due process of law" and the heavy burden of proving a person guilty beyond a reasonable doubt.

The danger of permitting arrests and prosecutions of occupants of vehicles on nothing more than their presence in a vehicle is not a fanciful one. So called "spot checks" of vehicles are permitted in the District of Columbia to enforce the District's Traffic and Motor Vehicle Regulations. (Mincy v. United States, 218 A.2d 507, 1966). Although it is next to impossible to state the frequency or regularity of such police conduct, Appellant submits that such "spot checks" and other police stops of motor vehicles for violations of the traffic laws, commonly furnish the factual setting under which a "plain-sight" observation and seizure of contraband in the vehicle is made. Law and Tactics in Exclusionary Hearings. (Coiner Publications, Ltd. 1969, pp.162-175.) There seems to be no standards in the District of Columbia to guide police in making arrests or the United States Attorneys Office in deciding which occupant in the vehicle to prosecute, or whether to prosecute at all.

II - THE EVIDENCE INTRODUCED AT APPELLANT'S TRIAL WAS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH THAT THE WEAPONS FOUND IN THE VEHICLE WERE WITHIN HIS ACCESS OR REACH.

Even, arguendo, if there was sufficient evidence to permit the inference that Appellant was aware of the presence of the weapons in the vehicle, there was a total absence of any evidence to permit the inference that the weapons found in the vehicle were within Appellant's "access or reach".

The decided cases in the District of Columbia construing the term appearing in 22 D.C. Code §3204 "on or about his person" have interpreted this element of the offense to mean that the weapon must be convenient of the accused's access or reach to be "on or about his person" within the meaning of the statute. (Brown v. United States, 58 U.S. App. D.C. 311, 30 F.2d 474, 1929; Wilson v. United States, supra).

The trial court below returned a general verdict of guilty without making a specific finding of fact as to which facts in evidence it relied on in finding Appellant guilty as charged. In the absence of any evidence that Appellant "jointly possessed" the .380 caliber pistol dropped by Co-defendant Werts as he was being removed from the vehicle, it cannot be said that Appellant's conviction is supported by the presence of that weapon in the

vehicle. As stated in the Hill case, "...if the government had introduced evidence of a common plan or purpose involving Appellant, the passenger...and the pistol, the trier of fact might have reasonably concluded that Appellant knowingly participated in the possession of the weapon and ammunition." (264 A.2d at 147). As stated by the Court in the case of State v. Simon, 57 S.W.2d 1062 (Mo., 1933),

> "...mere knowledge on the part of the Appellant that [a passenger] was committing the crime of carrying concealed a deadly weapon...and even Appellant's presence at the time, without any evidence of any act of participation by Appellant in the wrongdoing of [the passenger] does not tend to establish in any degree Appellant's guilt of the charge against him." (State v. Simon, 57 S.W.2d 1062, at 1063).

The only legitimate inference from the testimony below concerning the pistol found between the legs of the Co-defendant Werts was that it was in his hands, and that Werts was in the process of disposing of it at the time of his arrest. As stated by the Court in People v. Gant, 84 Ill. App.2d 208, 228 N.E. 2d 582 (1967), testimony that the arresting officer "merely heard a thud as he approached the vehicle, does not constitute evidence that it was defendant who dropped the gun to the floor or that he attempted to conceal the weapon." (228 N.E.2d at 585).

The Appellant could not have had the .380 caliber pistol weapon within his "convenient access or reach" at the time of his arrest in view of the fact that another officer had already escorted the Appellant from the vehicle when the arresting officer testified to the events surrounding the arrest of the Co-defendant Werts, and seizure of the .380 caliber pistol.

Appellant's conviction must therefore rest, again assuming arguendo that there was sufficient evidence before the trial court to permit an inference of knowledge of the presence of a weapon in the vehicle, on a finding by the trial court that the .22 caliber Derringer, also found in the vehicle, was within the Appellant's "convenient access or reach."

This weapon was found by the arresting officer, when he returned to make a more thorough search of the vehicle, partially exposed under the front passenger seat. There was no evidence introduced by the government at the trial below to permit the inference that this weapon was readily available for use by the Appellant without moving from his position on the driver's side of the vehicle, so as to be within his convenient access or reach.

In the case of Commonwealth v. Nunnelley, 247 Ky.109, 56 S.W.2d 689 (1933), a pistol was found underneath the front seat of the accused's automobile. The Appellant's conviction in

that case was reversed by the Court which stated,

> "The pistol was underneath the seat of the automobile. It was not in such close proximity to the person of the accused as that he could have readily secured it and used it should the occassion have arisen." (56 S.W.2d at 590).

See also Hampton v. Commonwealth, 257 Ky. 526, 78 S.W.2d 748 (1934); Brown v. United States, supra at 475; Wilson v. United States, supra; People v. Liss 405 Ill. 419, 94 N.E.2d 320 (1950).

A number of courts construing statutes similar to 22D.C. Code §3204 which prohibit a person from carrying a weapon "on or about his person" have construed this phrase to mean that the weapon be within a person's convenient access or reach without his altering his position so that it be available for immediate use.

In the case of People v. Liss, the Illinois Court reversed appellant-driver's conviction holding that a reasonable construction of the Illinois statute was that the weapon

> "must be on or about the person; and it must be so placed that it may be used without appreciable change in the position of the [defendant]. It requires no great wisdom to know that it is impossible to reach a pistol under the front seat of a car without changing position at the wheel, and it is necessary to bend forward to reach under the seat." (People v. Liss, 94 N.E.2d at 322).

See also annotation appearing in 43 A.L.R. 2d 492, "offense of carrying concealed weapon as affected by manner of carrying or place of concealment." There is no evidence in the trial record that Appellant could have reasonably achieved physical possession of the Derringer. There was no showing that he exercised, or could have exercised dominion and control over this Derringer.

III - THE APPELLANT'S CONVICTION IN THIS CASE RESTS ON AN IMPERMISSIBLE INFERENCE UPON ANOTHER INFERENCE.

It is an established rule in this jurisdiction that a criminal prosecution and conviction cannot be sustained by permitting an inference on the ultimate fact in issue to rest on another inference. See Benton v. United States, 98 U.S. App. D.C. 84, 232 E2d 341 (1956); Greene v. United States, 105 U.S. App. D.C. 334, 266 F.2d 932 (1959); Davis v. United States, 107 U.S. App. D.C. 76, 274 F.2d 585 (1960); and Malloy v. United States, 246 A.2d 781 (1968). See also annotation appearing in 5A.L.R.3d 100, "modern status of the rules against basing an inference upon an inference or a presumption upon a presumption."

In the case of State v. Simon, 57 S.W.2d 1062 (Mo.1932) the Court reversed Appellant's conviction for carrying a concealed weapon stating that it would have to "overcome the obstacle of inference upon inference presumption upon presumption." (57 S.W. 2d at 1063).

As in the Simon case, the Appellant's conviction rests upon an impermissible inference upon another inference. The trial court below must of necessity have inferred that Appellant knew of the presence of one or both of the weapons found in the vehicle despite the absence of any testimony concerning his state of mind,

or suspicious conduct prior to the stop of the vehicle probative of his state of mind, and reasoning from this inference, the trial court infers from it that Appellant therefore had the requisite right to dominion and control over the pistols found in the vehicle.

This reasoning is indeed tortuous and certainly does not comport with the strict standard that a person's guilt be proven beyond a reasonable doubt. While a criminal conviction may rest on circumstantial evidence, in whole or in part, the circumstances must prove the accused's guilt beyond a reasonable doubt. Rosengarten v. United States, 32 F.2d 644 (6th C.C.A., 1929). However, such circumstantial evidence must exclude every reasonable hypothisis except that of an accused's guilt. Tomplain v. United States, 42 F.2d 205,(5th C.C.A., 1930).

In the Davis case, this Court reversed an Appellant's conviction for violation of the gambling laws because the only testimony against him was that "he was repeatedly in the company of gamblers." (107 U.S. App. D.C. at 79.) The Court in Davis held that the circumstantial evidence adduced at the trial of Appellant was insufficient to prove Appellant's possession of gambling paraphernalia. The Court stated, "where the evidence of possession was weak and tenuous, we have refused to allow the jury to rest a presumption of illegal activity thereon." (107 U.S. App.D.C. at 79.

As in the Davis, Simon, and Arellanes cases, the circumstantial evidence at Appellant's trial was at best equivocal on the question of Appellant's knowledge of the presence of weapons in the vehicle. Yet the Court, as finder of facts, inferred Appellant's knowledge, despite the fact that the evidence equally permitted an inference consistent with Appellant's innocence of such guilty knowledge.

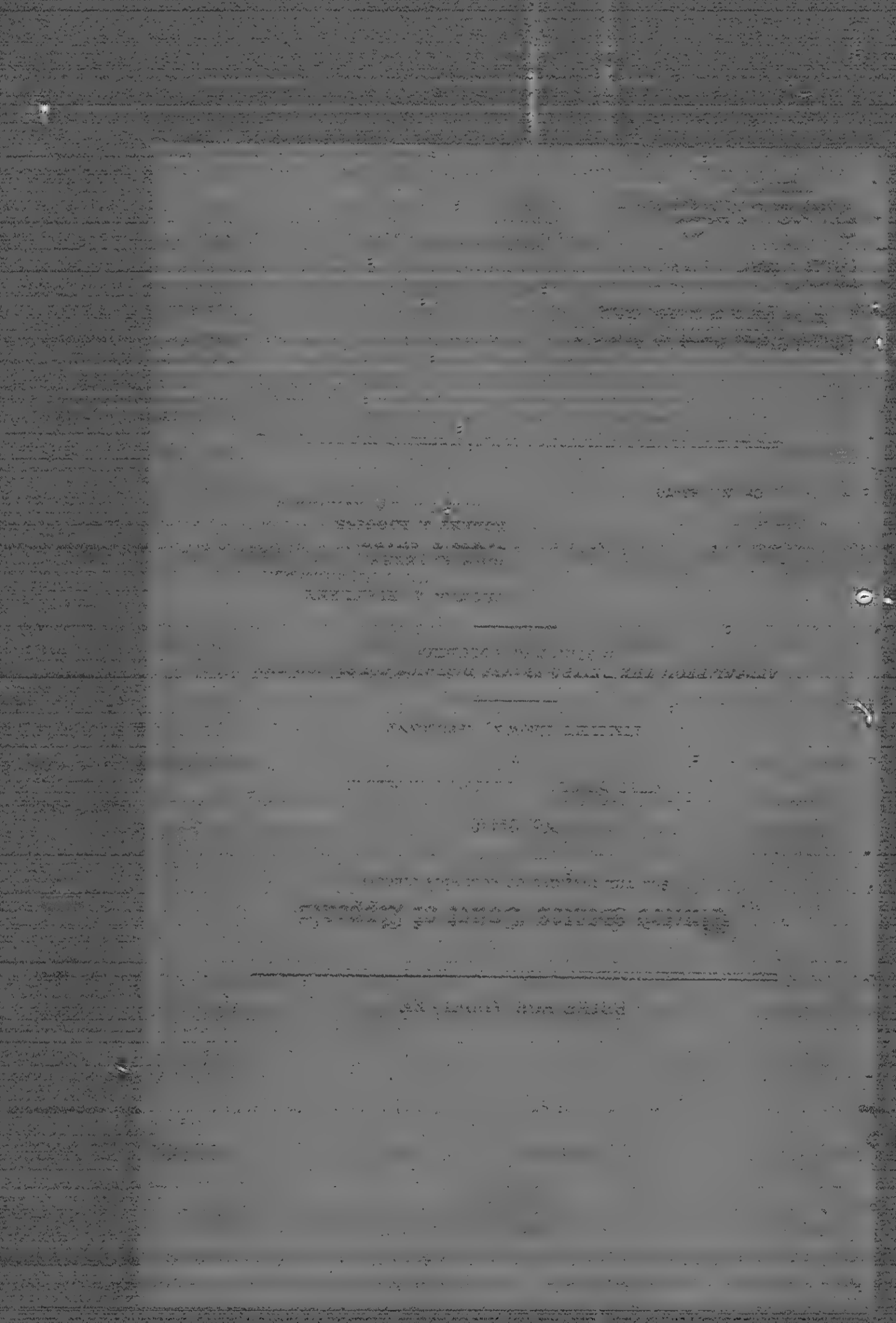
The trial court then compounded its error by inferring from the impermissible inference of guilty knowledge that Appellant had dominion and control over the weapons in the vehicle. This is an impermissible inference upon an inference.

CONCLUSION

Appellant submits that in view of the prejudicial errors committed by the Trial Court and the insufficiency of the evidence, that this Court grant the Appeal herein and direct the entry of a judgment of acquittal.

Respectfully Submitted,

LEONARD I. ROSENBERG, Esquire
Attorney for Appellant
(Appointed by this Court)
1525 New Hampshire Ave., N.W.
Washington, D.C. 20036
Tel. No. 234-3611



INDEX

TABLE OF CASES

OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

418-786—71

ISSUE PRESENTED*

In the opinion of appellee, the following issue is presented:

Whether the evidence was sufficient to establish appellant's guilt beyond a reasonable doubt?

---

*This case has not previously been before this court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24440

UNITED STATES OF AMERICA, APPELLEE

v.

TIMOTHY BROWN, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed on January 27, 1970, appellant, along with a co-defendant, David L. Werts, was charged with carrying a dangerous weapon in violation of 22 D.C. Code § 3204. On March 16, 1970, Judge Gerhard A. Gesell, after a full evidentiary hearing, denied appellant's and Werts' motions to suppress evidence.[1]

On April 27 appellant waived his right to trial by jury [2] and was tried alone before the Honorable Gerhard A. Gesell.[3] He was found guilty as charged and on June 5, 1970, was sentenced to serve two to six years. This appeal followed.

The Government's sole witness at trial was Officer Patrick J. Lilly. Officer Lilly testified that he was on duty on the morn-

[1] That ruling is not challenged on appeal.

[2] Appellant was personally interrogated in this regard by the court (Trial Tr. 5–6).

[3] The record does not reflect why appellant's case was severed from that of Werts.

ing of December 23, 1969. About 3:15 a.m., while operating his police cruiser, Officer Lilly noticed a Lincoln Continental at the intersection of Nineteenth and Q Streets, Northwest. Because of a lookout he received, Officer Lilly followed the car and stopped it in the 1200 block of U Street, Northwest. The car was driven by appellant, and Mr. Werts was in the front passenger seat. Officer Lilly approached the passenger side of the vehicle. At least twice Officer Lilly asked Werts to get out of the car. He said that as he did so:

> Mr. Werts was in a bent-over position with his hands between his legs, and turned to me and shook his head from side to side as if he were replying in an answer of, no.
>
> I opened the door at this time and asked Mr. Werts to step from the vehicle. Mr. Werts at this time gave me a blank stare, and I assisted Mr. Werts out of the vehicle. As I placed my left hand on his right arm and removed him from the vehicle, I heard something hit the floor of the automobile. As I took Mr. Werts from the auto, I looked down into the floor of the car to see what it was, and I saw at this time a .380 caliber automatic.
>
> I took Mr. Werts in the rear of the scout car and placed him in the custody of the transporting vehicle officers who were on the scene.
>
> Mr. Brown's position at this time was also removed from the vehicle and taken into custody * * * and searched.
>
> I went back to the automobile and had an officer stand by and watch the auto and make sure nobody entered it over a period of a few seconds, I would say. I went back to the auto and picked up the automatic and I had my flashlight in my hand at this time and as I picked up the automatic I could see gun grips of another weapon on the floor, which turned out later to be a .22 Derringer (Trial Tr. 8–9).

Both weapons were fully loaded and ready to fire. Both were on the floor by the passenger's seat. The .380 caliber automatic was

positioned right in front of where Mr. Werts had been sitting. The .22 caliber Derringer, the white grips protruding in front of the seat, was closer to the driver's seat, only about six inches from the center of the car. Both guns were later test-fired and found to be operable.

Appellant owned the automobile. He had no license to carry a gun in the District of Columbia.

No evidence was presented as to appellant's movements other than the fact that he was arrested and taken from the driver's seat by other officers who arrived on the scene about the same time that Lilly approached the passenger side of the car.

Appellant presented no evidence in his own behalf.

ARGUMENT

THE EVIDENCE WAS SUFFICIENT TO ESTABLISH APPELLANT'S GUILT BEYOND A REASONABLE DOUBT (TRIAL TR. 3–16)

Appellant asserts that, where the Government's case is largely circumstantial, a different standard should be used to test the evidence from that applied when the prosecution's evidence is direct. That argument has been specifically rejected both by the Supreme Court and by this Court. *Holland* v. *United States,* 348 U.S. 121, 139–40 (1954); *Howard* v. *United States,* 128 U.S. App. D.C. 336, 339 n.1, 389 F. 2d 287, 290 n.1 (1967); *Hunt* v. *United States,* 115 U.S. App. D.C. 1, 3, 316 F. 2d 652, 655 (1963). The record establishes that two men were in the front seat of the car. Two guns were on the floor. One protruded from under the passenger seat and was only six inches from the center of the car. Whether appellant knew the gun was there and whether it was within his reach were questions for the trier of the facts. The trier's decision on these issues ends the matter. *Wilson* v. *United States,* 91 U.S. App. D.C. 135, 198 F. 2d 299 (1952); *Brown* v. *United States,* 58 App. D.C. 311, 30, F. 2d 474 (1929); *United States* v. *Waters,* 73 F. Supp. 72 (D.D.C. 1947), *cause certified,* 84 U.S. App. D.C. 127, 175 F. 2d 340, *appeal dismissed,* 335 U.S. 869 (1948); *Waterstaat* v. *United States,* 252 A. 2d 507 (D.C. Ct. App. 1969); *Powell* v. *United States,* 246 A. 2d 641 (D.C. Ct. App. 1968).

CONCLUSION

Wherefore, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.
JOHN A. TERRY,
JAMES E. SHARP,
ROBERT J. HIGGINS,
Assistant United States Attorneys.

U.S. GOVERNMENT PRINTING OFFICE: 1971